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their quasi-judicial function, or a belated realization of the broader purposes behind the FTCA, is difficult to judge. Whatever the reason, the judiciary has shown a certain empathy with the Commission to the extent that the above general rules have become crystallized during recent years.

The new ruling appears to be nothing more than an express acknowledgement of the fact that the consumer does rely on tests and demonstrations, whether or not he has a traditional legal right to do so. It is a realistic rule which admits to the frailties of human nature and recognizes that the passage of the FTCA was prompted by a similar admission. Certainly the advertiser is aware of consumer motivation. If he were not, there would have been little need for legislation. Is it therefore unreasonable to warn an advertiser, who exploits the consumer's reliance on tests and demonstrations, that he shall be no more deceitful in presenting the proof which induces the sale than in alleging the quality itself?



ORGANIZATIONAL AND RECOGNITION PICKETING:

PERMISSIBLE ACTIVITY UNDER THE LANDRUM - GRIFFIN AMENDMENTS

The Labor Management Relations Act [hereinafter referred to as the Act] insures to employees "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . and to refrain from any or all such activities. . . ."¹ To further secure these rights, the Act was amended in 1959, and several new unfair labor practices, restricting certain union activities, were incorporated therein.² One of the new provisions, Section 8(b)(7)(C) of the

¹ Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958) [hereinafter cited as Taft-Hartley]. For two cases which construe the purpose of the act see *NLRB v. Red Arrow Freight Lines, Inc.*, 213 F.2d 260 (5th Cir. 1954); *NLRB v. Scullin Steel Co.*, 161 F.2d 143 (8th Cir. 1947).

² Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(c), 73 Stat. 544, 29 U.S.C. § 158(b)(7) (Supp. II, 1961) [hereinafter cited as Landrum-Griffin]. For a good discussion of the 1959 amendments to the act see Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959). An excellent analysis of the entire Landrum-Griffin Act is found in Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960).

Act as amended, prohibits organizational and recognition picketing under certain conditions; to what extent, however, is not clear.³ Recently, on reconsideration of *Local Joint Executive Bd. of Hotel & Restaurant Employees (Crown Cafeteria case)*, the National Labor Relations Board reversed its prior interpretation of the section as originally promulgated in that case.⁴ It will be the task of this note to present the first *Crown Cafeteria* case and the underlying rationale which led to its reversal.

The distinction between recognition and organizational picketing has been called "a purely verbal" one.⁵ "Picketing for organizational purposes is only fictionally different from picketing for immediate recognition. . . . The only difference relates not to the conduct of the union, or its effects, but to the union's explanation of its conduct. To make legal decisions vary on such a basis seems peculiar, if not unique."⁶ For purposes of discussion in this note, however, the distinction will be made.

Organizational picketing is directed at the employees of the picketed employer to persuade them to join the union.⁷ The

³ As former member of the NLRB Jenkins said: "A mere reading of section 8(b)(7) indicates that the problems raised are legion. One of the serious problems concerns the proviso to section 8(b)(7)(C) permitting 'picketing for the purpose of truthfully advising the public.'" Jenkins, *A Preliminary Look At Title VII*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 615, 627 (1961).

⁴ 1961 CCH N.L.R.B. ¶9672 (Feb. 20, 1961), *rev'd on rehearing*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶10939 (Feb. 20, 1962).

⁵ Cox, *supra* note 2, at 265. See Rains, *The Current Status of Organizational or Recognition Picketing*, 7 LAB. L.J. 539 (1956).

⁶ Petro, *Recognition of Picketing Under the NLRA*, 2 LAB. L.J. 803, 805 (1951). That the experts do not agree that the distinction between recognition and organizational picketing exists see Petro, *Free Speech and Organizational Picketing in 1952*, 4 LAB. L.J. 3 (1953). For a case where the distinction is recognized by the court see *Wood v. O'Grady*, 307 N.Y. 532, 122 N.E.2d 386 (1954).

⁷ *Pappas v. Local Joint Executive Bd.*, 374 Pa. 34, 36-37, 96 A.2d 915, 916 (1953). See FINLEY, *UNDERSTANDING THE 1959 LABOR LAW* 31-32 (1960); Bornstein, *Organizational Picketing in American Law*, 46 Ky. L.J. 25, 27 (1957). But see *Meltex, Inc. v. Livingston*, 28 CCH Lab. Cas. ¶69483, at 89875 (1955). "Whenever a union pickets the place of business of an employer whose employees do not belong to a union, it necessarily brings pressure to bear upon the employer and makes it at least likely that that employer will endeavor to relieve the pressure by doing something to get his employees to join the union which is doing the picketing. . . . I hence think it should be frankly realized [that it] necessarily is an attempt to cause the employer to commit the unfair labor practice of discriminating in order to encourage or discourage membership in a labor organization, and hence has an illegal objective."

One author even goes so far as to conclude that organizational picketing should be outlawed because of its purpose to force employers to coerce their employees into joining labor unions. Rothenberg, *Organizational Picketing*, 5 LAB. L.J. 689, 696 (1954).

objective is to enroll a majority of the employer's workers among the union's ranks so as to enable the union to carry out its functions as the bargaining representative with the employer. Recognition picketing, on the other hand, is the application of economic pressure to the employer to cause him to bargain directly with the union as the legal bargaining representative of the employees.⁸ However, if the picketing union does not represent a majority of employees in a bargaining unit, and a collective bargaining agreement is signed with the employer, it is subject to being set aside, as the recognition constitutes an unfair labor practice.⁹

Another type of picketing is informational, *i. e.*, picketing to truthfully advise the public. It is not prohibited by the section to be discussed,¹⁰ but nonetheless is relevant to this discussion. Informational picketing seeks to inform the public that the employer is committing, or has committed, some act inimical to the labor cause—whether it be an unfair labor practice or some other act which hinders the union's proper execution of its lawful activities.¹¹ Purely informational picketing is completely divorced from recognition or organizational objectives and merely serves to inform the public of the situation so that it will act in a manner to protect the economic interest of the union beyond the scope of organization or recognition.¹² Purely informational picketing would indeed seem to occur rarely, if ever, because the *ultimate* objective of all unions is to organize and be recognized.¹³ Due to this, courts have sometimes made a distinction between the *ultimate* objectives and the *immediate* objectives of union picketing, and have not disqualified picketing which merely has such ultimate objectives from being informational.¹⁴ It is only when the im-

⁸ See FINLEY, *op. cit. supra* note 7, at 31-32; Petro, *Recognition and Organizational Picketing in 1952*, 3 LAB. L.J. 819, 820 (1952). The latter article groups recognition picketing into five fact situations and analyzes the legality of such picketing under the given circumstances. *Id.* at 823-24, 885-86.

⁹ Goettl, *d/b/a Int'l Metal Prods. Co.*, 104 N.L.R.B. 1076 (1953).

¹⁰ Chfs Local 89, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10940, at 17055 (Feb. 20, 1962); *accord*, Penello v. Retail Store Employees Union, 188 F. Supp. 192, 200 (D. Md. 1960). See Feldblum, *Section 8(b)(7): The Case of the Puzzling Provisos*, 12 LAB. L.J. 502, 519 (1961). *Contra*, Kennedy v. Los Angeles Joint Executive Bd. of Hotel & Restaurant Employees, 192 F. Supp. 339, 342 (S.D. Cal. 1961).

¹¹ See Forkesch, *Informational, Representational and Organizational Picketing*, 6 LAB. L.J. 843 (1955). "[I]nformational picketing is to convey information, whether to employees, the employer, or to third parties, as the public or tradesmen. . . ." *Ibid.*

¹² Local Joint Executive Bd. of Hotel & Restaurant Employees, 1961 CCH N.L.R.B. ¶ 9672, at 15018 (Feb. 20, 1961).

¹³ Feldblum, *supra* note 10, at 509-10.

¹⁴ Brown v. Department & Specialty Store Employees' Union, 187 F. Supp.

mediate object is that of recognition or organization that it has fallen afoul of the law because of its unlawful nature.¹⁵

The Problem Defined

Section 8(b) (7) of the Act provides that it shall be an unfair labor practice for a union to picket where *an* object is organization or recognition under the following conditions: (A) where the employer has lawfully recognized, in accordance with the Act, any other labor organization; (B) where a valid NLRB election has been held within the past twelve months; or (C) *where such picketing has been carried on by an unrecognized union beyond a reasonable time (not to exceed thirty days) unless the union has filed a petition for an NLRB election.*¹⁶ However, proviso two of subparagraph (C) reads:

[N]othing in this subparagraph (C) shall be construed to prohibit any picketing . . . for the purpose of truthfully advising the public . . . that an employer does not employ members of, or have a contract with, a labor organization [unless it has the effect of inducing employees of others to

619, 623 (N.D. Cal. 1960); *Greene v. International Typographical Union*, 186 F. Supp. 630, 634 (D. Conn. 1960); *Penello v. Retail Store Employees Union*, 188 F. Supp. 193, 201 (D. Md. 1960); *Graham v. Retail Clerks Ass'n*, 188 F. Supp. 847, 856 (D. Mont. 1960); *Cavers v. Teamsters Local 200*, 188 F. Supp. 184, 190 (E.D. Wis. 1960).

¹⁵ *Cavers v. Teamsters Local 200*, *supra* note 14; *Penello v. Retail Store Employees Union*, *supra* note 14.

¹⁶ Landrum-Griffin § 704(c), 73 Stat. 544 (1959), 29 U.S.C. § 158(b) (7) (Supp. II, 1961).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees;

(A) where the employer has lawfully recognized in accordance with this sub-chapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . .” *Ibid.*

refuse to pick up or deliver goods or perform any services, i.e., refusal to cross picket lines].¹⁷

This proviso has created a problem of interpretation—what is its function? If *an* object of picketing is organization, but its purpose is to truthfully advise the public that the employer does not employ union members, does proviso two exempt the picketing from the applicability of subparagraph (C)? In other words, if *an* object is recognition or organization is it permissible if the pressure for this object is to be attained by an appeal to the public to exert that pressure? Or does the proviso simply protect picketing which truthfully advises the public that the employer does not employ union members when it is completely divorced from *an* object of recognition or organization? It is the specific aim of this note to answer these questions.

Generating Factors

Prior to the passage of section 8(b)(7), there were two cases of importance which represented restrictions on peaceful picketing not prohibited by section 8(b)(4). The first case was *Drivers Local 639 (Curtis Bros. case)*,¹⁸ decided in 1957. In that case the union had lost a representation election and the results were certified. Subsequently the union picketed the employer in order to obtain recognition and the employer filed a section 8(b)(1)(A) charge. The Board held that picketing for recognition by a minority union coerced the employees in exercising their guaranteed right to freely choose a collective bargaining representative, thus resulting in an unfair practice under section 8(b)(1)(A).¹⁹

On appeal the Board's order was set aside by the Court of Appeals for the District of Columbia.²⁰ The court felt that the Board's determination would: (1) effectively expunge Section 13 of the Act²¹ and render section 8(b)(4)²² redundant, (2) be

¹⁷ Landrum-Griffin §704(c), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(c) (Supp. II, 1961) (emphasis added).

¹⁸ 119 N.L.R.B. 232 (1957), *set aside and rem'd*, 274 F.2d 551 (D.C. Cir. 1958), *aff'd*, 362 U.S. 274 (1960).

¹⁹ *Id.* at 234, 247.

²⁰ *Drivers Local 639 v. NLRB*, 274 F.2d 551 (D.C. Cir. 1958).

²¹ Taft-Hartley § 13, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958). "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."

²² Taft-Hartley § 8(b)(4), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(4) (1958). Section 8(b)(4)(C) forbade organizational or recognition picketing

contrary to the intent of Congress as manifested by the legislative history, and (3) not be in consonance with long established Board precedent.²³

If any doubts existed as to whether or not the *Curtis Bros.* doctrine would be restricted to situations where the minority union had recently lost a Board conducted representation election, they were soon put to flight. In *International Ass'n of Machinists (Alloy case)*,²⁴ the minority union had not been recently involved in an election proceeding. In holding, *inter alia*, the union guilty of a section 8(b)(1)(A) violation, the Board stated that such a finding comported with their decision in *Curtis Bros.*²⁵ Thus it was clear that a minority union, whether found to be such by a recent Board election or otherwise, would be guilty of an unfair labor practice if it picketed for recognition purposes.²⁶

While the *Curtis Bros.* case was waiting to be heard by the Supreme Court on a writ of certiorari, Congress enacted the Labor-Management Reporting and Disclosure Act, containing section 8(b)(7). However, the Board continued to apply the *Curtis Bros.* and *Alloy* doctrines, since it felt that section 8(b)(7) was not meant to pre-empt the field in regulating peaceful recognition picketing.²⁷ This conclusion was engendered by a sentence in section 8(b)(7) which states that the section does not permit what is otherwise an unfair labor practice on the part of unions. The Board felt that section 8(b)(7) served to amplify already existing NLRA proscriptions,²⁸ of which *Curtis Bros.* and *Alloy* represent two.

This reasoning might be somewhat upset by the legislative history which provided that the *Curtis Bros.* and *Alloy* cases were overruled to the extent that they were inconsistent with the new section.²⁹ As it was not clear whether this referred to the Board

when another union had been *certified* as the bargaining representative of the employees concerned. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1101 (1960). For another type of picketing prohibited by the section, see *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951).

²³ *Drivers Local 639 v. NLRB*, *supra* note 20, at 552-53.

²⁴ 119 N.L.R.B. 307 (1957), *enforcement granted in part and denied in part*, 263 F.2d 796, *decree stayed in part*, 265 F.2d 239 (9th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960).

²⁵ *Id.* at 308.

²⁶ In the subsequent enforcement proceeding, the union was not allowed to contest the trial examiner's conclusions as to picketing and the Court of Appeals for the Ninth Circuit affirmed without considering the picketing aspects of the order. *NLRB v. International Ass'n of Machinists*, 263 F.2d 796, 798 (9th Cir. 1959).

²⁷ *Local 208, Int'l Bhd. of Teamsters*, 125 N.L.R.B. 159 (1959).

²⁸ *Id.* at 162 n.6.

²⁹ H.R. REP. No. 1147, 86th Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS 2513 (1959).

or the appellate dispositions,³⁰ the Board decided to let the Supreme Court decide whether *Curtis Bros.* and *Alloy* were improperly decided, before it ceased using the rationale of the two cases.³¹

In 1960, the Supreme Court affirmed the Court of Appeals' decision in *Curtis Bros.*, thus dealing the NLRB a setback.³² The Court employed the same arguments utilized by the court below and added that its decision found further support in the 1959 amendments, such as section 8(b)(7)(C). The high tribunal felt that section 8(b)(7)(C) "establishes safeguards against the Board's interference with legitimate picketing activity. . . . Were § 8(b)(1)(A) to have the sweep contended for by the Board, the Board might proceed against peaceful picketing in disregard of these safeguards."³³ Thus, a minority union may engage in peaceful picketing for purposes of recognition if it does not transgress sections 8(b)(7) or 8(b)(4).

The problems presented by the *Curtis Bros.* and *Alloy* cases were meant to be disposed of by section 8(b)(7). It is suggested that the two cases were a very important impetus to the inclusion of the section in the 1959 amendments to the Act. Certainly a reading of the two cases and a reading of subparagraphs (B) and (C) of the section shows a very close relationship between the problems presented by the fact patterns in the cases and the proscriptions in the two subparagraphs.

The First Crown Cafeteria Case

As stated above, one critical question is presented by the second proviso: Is picketing immunized from the proscriptions of 8(b)(7)(C) when it has both a purpose of truthfully advising the public and an object of organization or recognition?

The NLRB was first confronted with this question on February 20, 1961 when it decided the landmark *Crown Cafeteria* case;³⁴ its response was in the negative. In that case the Board determined that the picketing had an object of recognition or organization and had been carried on beyond a reasonable time without the filing of a petition for a Board election.³⁵ Also, it was found that the purpose was truthfully to advise the public that the

³⁰ See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 269 (1959).

³¹ See Jenkins, *A Preliminary Look at Title VII*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 615, 625 (1959).

³² NLRB v. Drivers Local 639, 362 U.S. 274 (1960).

³³ *Id.* at 291.

³⁴ Local Joint Executive Bd. of Hotel & Restaurant Employees, 1961 CCH N.L.R.B. ¶9672 (Feb. 20, 1961).

³⁵ *Id.* at 15017.

employer did not employ union members or have a contract with a labor union.³⁶ The question, then, was squarely presented to the Board.

In finding the union guilty of an unfair labor practice in violation of section 8(b)(7)(C), the majority of the Board held that where a *present* object of picketing is for organization or recognition, it is of no import that it may also have a purpose of truthfully advising the public that the employer does not have a labor contract with, or employ members of, a labor organization.³⁷ The Board reached its decision on the ground that proviso two of subparagraph (C) was not devised to carve, out of the proscriptions of the section, two conditions under which organizational or recognition picketing could be exercised with impunity. The majority felt the intent of Congress was to outlaw organizational and recognition picketing and the second proviso was "added . . . only to make clear that *purely* informational picketing" within the scope of the second proviso is not to be curtailed.³⁸ This being true, the application of the proviso should be confined "to picketing where the *sole* object is dissemination of information divorced from a present object of recognition."³⁹ It is thus clear that the Board felt that Congress enacted the proviso merely to protect purely informational picketing. Also, the Board cited the legislative history as being indicative of this position. Relying on the last part of a paragraph in a statement made by then Senator John F. Kennedy before the Senate on opening debate on the final bill, the majority pointed out that the Senator had specifically stated that the proviso only applied to purely informational picketing.⁴⁰

The Board specifically stated in its opinion that a *present* object of recognition will cause the picketing to be unlawful. Section 8(b)(7)(C) does not differentiate between present or immediate objects or any other type of object; rather it simply

³⁶ *Id.* at 15018.

³⁷ This interpretation had been proffered by several federal courts: Department & Specialty Store Employees' Union v. Brown, 284 F.2d 619, 628 (9th Cir. 1961); McLeod v. Local 239, Int'l Bhd. of Teamsters, 179 F. Supp. 481, 487 (E.D.N.Y. 1960); Elliot v. Sapula Typographical Union, 38 CCH Lab. Cas. ¶66020 (N.D. Okla. 1959); Phillips v. International Ladies Garment Workers, 38 CCH Lab. Cas. ¶66051 (M.D. Tenn. 1959). See Glickstein and Gold, *The New Labor Law: A Very Limited Management Victory*, 6 N.Y.L.F. 412, 422 (1960).

³⁸ Local Joint Executive Bd. of Hotel & Restaurant Employees Union, 1961 CCH N.L.R.B. ¶9672, at 15018 (Feb. 20, 1961) (emphasis added).]

³⁹ *Ibid.*

⁴⁰ *Ibid.* The statement relied on reads: "Purely informational picketing cannot be curtailed under the conference report, although even this privilege would have been denied by the Landrum-Griffin measure." 105 Cong. Rec. 17898 (1959). To what extent the Landrum-Griffin measures would have curtailed purely informational picketing is not clear.

states that where "an object" of picketing is for organization or recognition, it shall be an unfair labor practice under conditions specified in subparagraphs (A), (B), or (C).⁴¹ What, then, would have been the Board's determination if the picketing merely had an *ultimate* object of organization, as opposed to a present or immediate object? This question remains unanswered and presents some interesting problems. Under ordinary circumstances, it seems difficult to imagine a *pragmatic* situation where the union's ultimate object in picketing would not be for recognition or organization.⁴² It becomes progressively more difficult to envision such a situation where legends on picket placards impart that the employer neither employs union members nor has a labor contract with a union. This difficulty has been somewhat alleviated by the distinction made by some federal courts between the immediate and ultimate objects of picketing when they have been called on to issue labor injunctions pursuant to provisions under the Act.⁴³

In *Graham v. Retail Clerks Ass'n*⁴⁴ and *Greene v. International Typographical Union*,⁴⁵ the courts utilized this distinction in order to avoid an extreme application of the section, which would virtually prohibit all picketing because of the union's ultimate objective.⁴⁶ Even though the Board has not passed upon the problem, some reference was made to this distinction in a footnote to a recent Board decision:

Although we find . . . in agreement with the Trial Examiner . . . we do not adopt or rely upon that portion of the Intermediate Report relating to the distinction, sometimes made, between the so-called "ultimate" objects and "immediate" objects which are alleged to underlie all picketing.⁴⁷

⁴¹ See note 16 *supra*.

⁴² See *Greene v. International Typographical Union*, 186 F. Supp. 630, 634 (D. Conn. 1960); *Getreu v. Bartenders & Hotel & Restaurant Employees Union*, 181 F. Supp. 738, 741 (N.D. Ind. 1960); *Graham v. Retail Clerks Ass'n*, 188 F. Supp. 847, 855-56 (D. Mont. 1960). But for a possible illustration of informational picketing see *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960).

⁴³ *Greene v. International Typographical Union*, 186 F. Supp. 630 (D. Conn. 1960).

⁴⁴ *Graham v. Retail Clerks Ass'n*, *supra* note 42.

⁴⁵ 186 F. Supp. 630, 634 (D. Conn. 1960).

⁴⁶ In interpreting the meaning of *an objective* in a section 8(b)(4)(C) proceeding one court has said: "Picketing which is obviously for some permissible objective should not be condemned because, arguably, there may also be such a residual hope that a prohibited end will also be realized." *NLRB v. Bakery & Confectionery Workers Union*, 245 F.2d 542, 548 (2d Cir. 1957).

⁴⁷ *Teamsters Local 200*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10659, at 16519 n.1 (Nov. 24, 1961). For a case where the NLRB found the union guilty of an unfair labor practice under § 8(b)(4)(C) of the act because of its *ultimate end* of picketing, see *International Hod Carriers Union*, 1961 CCH N.L.R.B. ¶ 9630, at 14903 (Feb. 10, 1961).

Whether this is a repudiation of the distinction as applied to that case only, or a general repudiation, cannot be ascertained from this quotation. If it be interpreted that the Board has made a general repudiation of the distinction between ultimate and immediate objects of picketing, then it would seem that the statute could read: where an object (immediate or ultimate) of picketing is recognition or organization, it is an unfair labor practice, (C) where a stranger union has picketed beyond a reasonable time without filing a petition for a Board election. Since it is difficult to imagine when the ultimate object of a union would not be organization or recognition, it is likewise difficult to imagine when the picketing would, therefore, not be classified as organizational or recognition within the meaning of 8(b)(7)(C) and thus be prohibited. Since almost all picketing would be classified as organizational or recognition, then proviso two becomes a practical nullity as interpreted by the Board in the first *Crown Cafeteria* case.⁴⁸ Clearly, if the proviso only protects purely informational picketing, then it really has no effect at all, as the ultimate object of almost all picketing disqualifies it from being purely informational. This would be a very harsh result and, although reached by a logical process, would raise a constitutional question.

Constitutional Problems

It was stated by the majority in the original *Crown Cafeteria* decision that it was the intent of Congress to outlaw organizational and recognition picketing, and that proviso two did not protect any picketing which had as an object recognition or organization.⁴⁹ This creates a constitutional problem by virtue of the fact that picketing contains elements of communication which are protected by the first and fourteenth amendments of the federal constitution.⁵⁰

In the much quoted case of *Thornhill v. Alabama*,⁵¹ the Supreme Court declared invalid on its face an Alabama statute which, in effect, prohibited all forms of peaceful picketing.⁵² The Court equated picketing with speech and thus wrapped it in the pro-

⁴⁸See *Getreu v. Bartenders & Hotel & Restaurant Employees Union*, *supra* note 42, at 741.

⁴⁹Local Executive Bd. of Hotel & Restaurant Employees Union, 1961 CCH N.L.R.B. ¶9672, at 15017 (Feb. 20, 1961).

⁵⁰*Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁵¹*Ibid.*

⁵²*Ibid.* The section of the statute attacked read: "Any person or persons . . . who picket the works or place of business of . . . other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor. . . ." *Id.* at 91-92.

tective cloak of the Constitution.⁵³ However, the broad, encompassing language employed in *Thornhill* was later qualified.⁵⁴ In *Bakery & Pastry Drivers Local 802 v. Wohl*⁵⁵ it was stated:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.⁵⁶

This quotation reflects the general rationale employed to distinguish free speech from peaceful picketing, thus giving the government power to control peaceful picketing when it contravenes valid public policy. However, the spirit of *Thornhill* is not moribund, as is evidenced by the case of *International Bhd. of Teamsters v. Vogt, Inc.*⁵⁷ In *Vogt*, the Court was of the opinion that a state might place restrictions on peaceful picketing in order to effectuate public policy, but it could not "enact blanket prohibitions against picketing."⁵⁸ This warning logically applies to the federal government as well as to the states.⁵⁹

It would seem that Congress was aware of the efficacy of *Thornhill*. This would tend to cast doubt upon the assumption that section 8(b)(7)(C) was meant to be as broad a prohibition against peaceful organizational and recognition picketing as the majority in the first *Crown Cafeteria* case indicated. Apparently

⁵³ In striking down the section of the statute, the Court said, "we think that [the section] is invalid on its face. . . . In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Id.* at 101-02.

⁵⁴ The following cases, while not exhaustive, will be a guide to trace the limitations which have fettered the application of *Thornhill*. *Milkwagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775-77 (1942) (concurring opinion); *Gibboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Plumbers Union v. Graham*, 345 U.S. 192 (1953); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957).

⁵⁵ 315 U.S. 769 (1942).

⁵⁶ *Id.* at 776 (concurring opinion).

⁵⁷ 354 U.S. 284 (1957). In a case decided subsequent to *Vogt*, the Supreme Court employed *Thornhill* to reverse a decision of the Kansas Supreme Court and declared a permanent injunction on picketing issued by a state court too restrictive. *Chauffeurs, Teamsters & Helpers Union v. Newell*, 356 U.S. 341 (1958) (per curiam), reversing 182 Kan. 205, 319 P.2d 171 (1957).

⁵⁸ *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, *supra* note 54, at 294-95.

⁵⁹ *Lebus v. Building & Constr. Trades Council*, 43 CCH Lab. Cas. ¶ 17315, at 25692 (E.D. La. 1961). See *Chefs, Cooks & Pastry Cooks, Local 189*, 4 LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10940, at 17055 n.5 (Feb. 20, 1962).

one of the reasons that the second proviso was included in the 1959 Act was to insure the constitutionality of section 8(b)(7)(C).⁶⁰ If proviso two does not serve to allow certain aspects of recognition or organizational picketing to be exercised, perhaps the Supreme Court might find the section more restrictive on the element of speech contained in picketing than is necessary to effect the declared public policy as found in the Act.⁶¹ This would lend weight and give credence to an interpretation quite opposed to that rendered in *Crown Cafeteria* in the first opinion, *i. e.*, that proviso two exempts organizational and recognition picketing when they meet certain standards. Another factor which tends to bolster this interpretation is the legislative history.

Legislative History

The second proviso of subparagraph (C) of section 8(b)(7) does not have an extensive legislative history. This is due to its late insertion in the bill, for it was not a part of the bill passed by the House and did not appear until after the bill was referred to the joint conference committee.⁶² Then, to complicate matters further, the report of the conference⁶³ was not available to either house before the passage of the final bill.⁶⁴ As a result, the intent of Congress in passing the final bill as reported out of conference cannot accurately be ascertained from this report. The only explanation of the intent and effect of proviso two, as reported by the conference committee, that was available to both houses before passage of the final bill, was a statement read by Senator Kennedy in opening debate on the floor of the Senate.⁶⁵ This statement

⁶⁰ See *Lebus v. Building & Constr. Trades Council*, *supra* note 59, at 25690-91.

⁶¹ "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." Taft-Hartley § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1958).

⁶² See Goldberg and Meiklejohn, *Title VII: Taft-Hartley Amendments with Emphasis on the Legislative History*, 54 Nw. U.L. REV. 747, 766-68 (1960).

⁶³ H.R. REP. 1147, 86 Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS 2512 (1959).

⁶⁴ Goldberg and Meiklejohn, *supra* note 62.

⁶⁵ *Id.* at 767. At any rate, H.R. REP. No. 1147, 86th Cong., 1st Sess., 2 U.S. CODE CONG. & AD. NEWS 2512-13 (1959), does not contain an explanation of proviso two.

explained in some detail the provisions adopted by the conference committee. Thus, the intent of Congress in passing the 1959 Act can best be determined by reference to that statement:

The House bill would have forbidden virtually all organizational picketing, even though the pickets did not stop truck deliveries or exercise other economic coercion. The *amendments adopted* in the conference secure the right to engage in all forms of organizational picketing up to the time of an election. . . . When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election.⁶⁶

An analysis of the statement would seem to reveal that proviso two was adopted by the conferees to insure that organizational and recognition picketing would not be unreasonably restricted. Subparagraphs (A) and (B) of section 8(b)(7) were reported out of the joint conference committee unchanged in any detail.⁶⁷ The only substantial changes made as to the application of the section were: (1) expungement of a subparagraph which would have required a substantial showing of representation before organizational or recognition picketing would have been allowed,⁶⁸ and (2) amendment of subparagraph (C) by the adoption of the second proviso. Since the statement refers to amendments adopted to secure rights of organizational picketing, it seems clear that reference was had to that proviso, as it is the only amendment which purports to alter the proscriptions of the section. In this light, it can be seen that the legislative history might bolster an interpretation of the second proviso to the effect that organizational or recognition picketing would be without section 8(b)(7)(C) when it truthfully advises the public that the employer neither hires union members nor is a party to a collective bargaining agreement. A further argument to support this position has been given by the NLRB in its recent reversal of the *Crown Cafeteria* case on rehearing.

⁶⁶ 105 CONG. REC. 17898 (1959) (remarks of Senator Kennedy) (emphasis added).

⁶⁷ Compare H.R. 8400, 86th Cong., 1st Sess. § 705(b) (1959), which was the administration bill passed by the House, with the final bill S. 1555, 86th Cong., 1st Sess. § 704(c) (1959).

⁶⁸ This is the same interest which must be shown before the Board will process a union's petition for a representation election. Taft-Hartley § 9(c), 61 Stat. 143 (1947), as amended, 29 U.S.C. § 159(c) (1958). Usually the Board requires a thirty per cent showing in the absence of extenuating circumstances. 29 C.F.R. § 101.18 (Supp. 1961). It would seem to have been extremely harsh if the Board would have required a thirty per cent showing of interest before it would have allowed organizational or recognition picketing.

Reversal of Crown Cafeteria

On a motion for reconsideration, the Board reversed the original decision in *Crown Cafeteria* and dismissed the complaint against the union.⁶⁹ The majority of the members (one of whom was on the Board at the writing of the original decision of *Crown Cafeteria* and dissented to that determination) adopted the dissenting opinion of the first *Crown Cafeteria* case.⁷⁰ The dissent in the first decision indicated that the proviso "should be interpreted as having vitality" and not "as if . . . Congress had inserted mere language intended to serve as a useless appendage in an academic vacuum."⁷¹ Moreover, it asserted that section 8(b)(7)(C) does not prohibit purely informational picketing;⁷² thus to have vitality, the proviso must be read to allow "recognition or organizational picketing which truthfully advised the public. . . ."⁷³ In other words, since section 8(b)(7) does not purport to concern itself with prohibiting informational picketing, the second proviso is mere surplusage if its function is simply to protect that which is not in danger. This argument is very cogent in view of the fact that it is generally accepted that a statute should be read in a manner which gives meaning to all its parts.⁷⁴

Another argument made by the dissent in the original *Crown Cafeteria* case was that the majority's interpretation created an unfair labor practice which was "wholly outside the statutory intendment,"⁷⁵ i. e., if informational picketing within the confines of proviso two caused third party employees to refuse to cross the picket line to render services or pick up or deliver goods, then informational picketing becomes an unfair labor practice subject to injunctive action as provided in the Act. This clearly is without the scope of section 8(b)(7) as is shown by a reading of the section—its limits of application are set at *organizational* and *recognition* picketing. As was said by the dissent in the first case, in closing its argument as to this phase

⁶⁹ Local Joint Executive Bd. of Hotel & Restaurant Employees, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶10939 (Feb. 20, 1962).

⁷⁰ Local Joint Executive Bd. of Hotel & Restaurant Employees, 1961 CCH N.L.R.B. ¶9672, at 15019 (Feb. 20, 1961) (dissenting opinion).

⁷¹ *Ibid.*

⁷² *Id.* at 15020 (emphasis added).

⁷³ *Id.* at 15021. See *Getreu v. Bartenders & Hotel & Restaurant Employees Union*, 181 F. Supp. 738 (N.D. Ind. 1960); *Lebus v. Building & Constr. Trades Council*, 43 CCH Lab. Cas. ¶17315 (E.D. La. 1961).

⁷⁴ 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §4705 (3d ed. 1943). See *Brotherhood of Locomotive Firemen & Enginemen v. Northern Pac. Ry.*, 169 F. Supp. 411, 415 (D. Minn. 1959).

⁷⁵ Local Joint Executive Bd. of Hotel & Restaurant Employees, 1961 CCH N.L.R.B. ¶9672, at 15019 (Feb. 20, 1961) (dissenting opinion).

of its opinion: "[I]t is [not] for the Board to rewrite the 1959 amendments [to the Act]"⁷⁶ by creating new unfair labor practices by the process of interpretation.

Finally, the dissent in the first *Crown Cafeteria* case was of the opinion that the legislative history was clearly in accord with its interpretation, and that the majority had read Senator Kennedy's statement out of context.⁷⁷ The legislative history argument has been presented earlier in this note so it is not necessary to present it at this point. As the legislative history is not replete, and the statutory language is open to more than one interpretation, it would seem difficult to establish an interpretation which would survive each new administration's policies and philosophies. The reversal of *Crown Cafeteria* was a three-to-two decision and would seem to reflect a somewhat more liberal attitude toward the workings of the section. It is far from being a settled question of law at this point, because, as subsequent reconstituted Boards decide new cases involving like situations, the attitude might well change again.

The reversal of the *Crown Cafeteria* case does not present a new interpretation of the proviso as far as the federal district courts are concerned. In 1960, prior to the first *Crown Cafeteria* decision, a district court in *Getreu v. Bartenders & Hotel & Restaurant Employees Union*⁷⁸ also reached the conclusion that proviso two was designed to exempt certain types of organizational or recognition picketing. In that case it was admitted that an object of the picketing was for recognition, but a purpose was also truthfully to advise the public. In a very lucidly written opinion, Chief Judge Swygert stated:

I think subparagraph (C) means that although "an object" of picketing may be [recognition] . . . it is immunized from the statute if "the purpose" of such picketing is also truthfully to inform the public that the employer does not have a contract with the union. . . .⁷⁹

This succinct statement accurately sums up the present state of the law as promulgated by the Board in its reversal of the *Crown Cafeteria* case.

Other Reflections

The *Crown Cafeteria* reversal strongly implied that informational picketing, when found, would not become an unfair labor practice because employees of others refuse to cross the picket

⁷⁶ *Ibid.*

⁷⁷ *Id.* at 15020-21.

⁷⁸ 181 F. Supp. 738 (N.D. Ind. 1960).

⁷⁹ *Id.* at 741.

line. However, *Local 89, Chefs, Cooks, Pastry Cooks & Assistants* (*Stork* case),⁸⁰ was heard on a motion for reconsideration⁸¹ the same day as *Crown Cafeteria*, and this question was considered. The Board affirmed its prior determination that when recognition or organizational picketing, within the protection of proviso two, causes employees of others to refuse to cross the picket lines, it will be an unfair labor practice if carried on beyond a reasonable time without filing a petition for an election with the Board. However, the Board wished to make it explicitly clear that it would not be an unfair labor practice if the employees of others so refuse due to *informational* picketing alone,⁸² as the original opinion in the *Stork* case had intimated.⁸³

This still leaves unanswered the question as to what constitutes informational picketing. Will the Board now accept or reject the test whereby a distinction is made between the ultimate and immediate objects? Or will the Board demand a "complete divorce" from organizational or recognition objectives? It would seem that the Board, in consonance with its recent liberal interpretations, will not demand that such a strict test as the latter be applied. It is not clear, however, what test the Board will employ, but a device will have to be utilized so that the ultimate object of all union activity will not disqualify picketing from being informational.

Another interesting problem presents itself: what informational picketing will be construed to fall within the limits of proviso two so that its alternative object of recognition or organization will be protected? Would picketing to protest an unfair labor practice on the part of the employer be so construed? If the protest is connected with an unfair labor practice whereby the employer manifests that he does not wish to employ union members, then it could be argued that it falls within the meaning of proviso two and its object of recognition or organization is thereby protected. It will be interesting to see the extent to which the Board will go to insure labor that its vital weapon of picketing will not be rendered less potent.⁸⁴

⁸⁰ 1961 CCH N.L.R.B. ¶9671 (Feb. 20, 1961).

⁸¹ *Chefs Local 89*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶10940 (Feb. 20, 1962).

⁸² *Id.* at 17055.

⁸³ *Local 89, Chefs, Cooks, Pastry Cooks & Assistants*, 1961 CCH N.L.R.B. ¶9671 (Feb. 20, 1961).

⁸⁴ In *Department & Specialty Store Employees' Union*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶11034 (Mar. 19, 1962), the Board held that picketing protected by proviso two of section 8(b)(7)(C) could not trigger an expedited election as provided in that section. The Board stated that an expedited election under such conditions was not a valid election within the meaning of section 8(b)(7)(B) which prohibits organizational or recognition picketing for one year after a valid

Conclusion

The reversal of *Crown Cafeteria* and the holding in the *Getreu* case seem to better reflect the legislative history and the plain meaning of the section. Furthermore, these two decisions seem to obviate the constitutional problems and avoid making the proviso a nullity. Proviso two still appears to present formidable problems. But once the present interpretation becomes instilled in labor relations it should not be lightly overturned. Both management and labor should know within what bounds they can operate legally. The present Board's interpretation better effectuates the policy of the Act than did the prior interpretation and should be the one to ultimately be declared law, either by clarification by Congress or the Supreme Court.



THE CONTRACT PROPOSALS TO THE SECOND RESTATEMENT,
CONFLICT OF LAWS: A COMPARATIVE ANALYSIS

Almost every author who undertakes a discussion of the contracts area of the conflict of laws feels that he must preface his remarks with some indication of the uncertainty and confusion surrounding his topic.¹ Perhaps the most basic reason for the confusion can be traced to differences of opinion as to the very philosophies which form the foundation of our legal system.² But a somewhat more mundane explanation may be found in the fact that theorists attempted to lay down one or two simple and apparently precise rules to govern this wide and complex subject, while the courts, even when openly espousing these rules, refused to be controlled by them.³ However, it is only fair to point out that even before the American courts were confronted with any "precise rules,"⁴ one would often find contradictory—or at

Board election. Thus, if the picketing protected by proviso two continues after such expedited election the picketing will not be an unfair labor practice under 8(b)(7)(B) and will continue to be protected by that proviso.

¹ See, e.g., Beale, *What Law Governs the Validity of a Contract* (I), 23 HARV. L. REV. 1 (1909); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1921).

² See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 3-47 (1942).

³ See RESTATEMENT (SECOND), *CONFLICT OF LAWS*, Introductory Note, at 2 (Tent. Draft No. 6, 1960).

⁴ See RESTATEMENT, *CONFLICT OF LAWS* § 332 (1934).